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In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF UTAH, ET AL., PETITIONERS

v.

UTE INDIAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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The Solicitor General, on behalf of the United States as amicus curiae, respectfully moves for leave to file the attached supplemental memorandum on behalf of the United States as amicus curiae.

This case presents the question whether the Uncompahgre and Uintah Indian Reservations in Utah were disestablished or diminished by various Acts of Congress adopted around the turn of the Century. The Court invited the Solicitor General to file a brief expressing the views of the United States, and we filed our brief on November 10, 1986. The United States takes the position in that brief (i) that the court of appeals correctly held that the Uintah Reservation was not dismissed in 1905 by the opening of certain unallotted lands to non-

Indian settlement and the inclusion of other such lands in a forest reserve, and (ii) that the court of appeals erred in holding that the Uncompahgre Reservation was not disestablished by the Act of June 7, 1897, ch. 3, 30 Stat. 62 *et seq.* However, we also take the position in our amicus brief that the question of the status of the Uncompahgre Reservation does not warrant plenary review by this Court because there is no conflict with state court decisions and because the court of appeals' holding is of little practical importance, since the lands within the boundaries of the original Uncompahgre Reservation are primarily owned by the United States and are largely uninhabited. See U.S. Amicus Br. 20-21.

On November 21, 1986, petitioners filed a supplemental brief in response to the brief of the United States. In their supplemental brief, petitioners argue that the court of appeals' holding as regards the Uncompahgre Reservation warrants review because "hundreds of millions of dollars" are at issue in this case (Pet. Supp. Br. 2-3, 11-12). The premise of this assertion is that the holding below might entitle the Tribe to receive the proceeds of the oil and gas leasing of federally owned lands in the Reservation pursuant to 25 U.S.C. 398b, and thus preclude the State from continuing to share in those proceeds, as it currently does under the Mineral Lands Leasing Act, 30 U.S.C. 191. Petitioners assert that, "incredibly," the United States "overlooks" that consequence (Pet. Supp. Br. 2-3). If indeed that would be the consequence of the court of appeals' holding as regards the Uncompahgre Reservation, then petitioners overlooked it as well, because they made no mention of this point in their certiorari petition or reply brief. In our view, however, as we explain in the attached memorandum, the State will continue to be entitled to receive its share of revenues under 30 U.S.C. 191—and the Tribe will not be entitled to any portion of those revenues under 25 U.S.C. 398b—if the court of appeals' holding that the Uncompahgre Reservation continues to exist is permitted to stand.

Because the Court invited the Solicitor General to file a brief expressing the views of the United States, and because we had no occasion in that brief to address the issue of mineral revenues, we believe the Court may wish to have the views of the United States on this issue as well.

For the foregoing reasons, we respectfully request that the motion for leave to file the attached supplemental memorandum be granted.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Petitioners argue in their supplemental brief in response to the brief filed on behalf of the United States as amicus curiae that "hundreds of millions of dollars" may turn on the status of the Uncompahgre Reservation. Petitioners submit that, if the original Uncompahgre Reservation was not disestablished, the Tribe might claim all revenues from oil and gas leasing on federal lands within the original boundaries of the Reservation under 25 U.S.C. 398b and that the State accordingly should no longer receive 50% of those revenues under 30 U.S.C. 191. See Pet. Supp. Br. 2-3, 11-12. In petitioners' view,

this possible consequence indicates that the Court should grant review of the court of appeals' holding that the Uncompahgre Reservation was not disestablished in 1897.

Petitioners do not actually take the position that the Tribe will receive all royalties, bonuses, and other income from such leasing, and indeed petitioners presumably would argue otherwise if the Tribe actually filed suit to establish a right to receive those revenues. Their concern is only that the Tribe might *claim* such a right in some future lawsuit, as it did in its motion to intervene (at 14-15) in *Andrus* v. *Utah*, 446 U.S. 500 (1980). In our view, any such claim by the Tribe would be without merit. The statutory allocation of the revenues realized by the United States from mining on lands to which the United States holds absolute title, and in which the Tribe has no beneficial interest, is in no way affected by whether those lands are within the original boundaries of an undiminished Indian Reservation—just as the location of other non-Indian lands within the boundaries of an Indian reservation does not entitle the Tribe to a share of the royalties and other income from mining on those lands.

1. Section 1 of the Mineral Lands Leasing Act of 1920, as codified at 30 U.S.C. 181, provides that "[d]eposits of coal, phosphate, sodium, potassium, oil, oil shale, gilsonite * * * or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this chapter * * *." There are express exceptions in Section 1 for mineral lands "in incorporated cities, towns, and villages and in national parks and monuments," and for "lands within the naval petroleum and oil-shale reserves"; but there is no such exception for mineral lands owned by the United States that are situated within the boundaries of an Indian reservation. It follows that lands and mineral deposits within the original boundaries of the Uncompahgre Reservation that are "owned by the United States" are subject to leasing under the Mineral

Lands Leasing Act, whether or not the Reservation still exists.

Under Section 35 of the Mineral Lands Leasing Act, as amended (30 U.S.C. 191), "[a]ll money received from sales, bonuses, royalties[,] including interest charges collected under the Federal Oil and Gas Royalty Management Act of 1982 [30 U.S.C. 1701 *et seq.*], and rentals of the public lands under the provisions of this chapter * * * shall be paid into the Treasury of the United States." Section 35 further provides that 50% of such revenues "shall be paid by the Secretary of the Treasury * * * to the State," which must use those funds for planning, construction and maintenance of public facilities, and public services, with priority given to localities that experience the greatest impact from federal leasing activities. 30 U.S.C. 191. There is no exception in this revenue-sharing provision for money received from the leasing of those public lands that happen to be located in the boundaries of an Indian reservation.

Indeed, the absence of any such exception is underscored by the Federal Oil and Gas Royalty Management Act of 1982, which is referred to in 30 U.S.C. 191, quoted above. That Act establishes procedures to ensure, inter alia, "the prompt and proper collection and disbursement of oil and gas revenues owed to the United States and Indian lessors and those inuring to the benefit of the States." 30 U.S.C. 1701(b)(3). Under the revenue-sharing scheme of Section 35 of the Mineral Lands Leasing Act, discussed above, revenues "inuring to the benefit of the States" are those derived from lands *other* than those for which there would be "Indian lessors." Because the United States owns outright the public lands within the boundaries of the original Uncompahgre Reservation, and therefore is the lessor of them, there is no "Indian lessor" of these lands.

Moreover, the 1982 Act expressly distinguishes between "Federal land," which is broadly defined to mean "all land and interests in land owned by the United States

which are subject to the mineral leasing laws," and "Indian lands," which are defined to mean "any * * * interest in lands of an Indian tribe or an Indian allottee held in trust by the United States or which is subject to Federal restriction against alienation" (30 U.S.C. 1702(1) and (3)). The public lands within the boundaries of the original Uncompahgre Reservation are not "lands of an Indian tribe * * * held in trust by the United States"; they are, rather, "land[s] * * * owned by the United States," and therefore "Federal lands" for purposes of the 1982 Act. Compare 43 U.S.C. 1702(e), discussed in U.S. Amicus Br. 21. Congress confirmed in the 1982 Act that the lands in which the Tribe has a revenue interest are only those to which it might claim some equitable interest, not "Federal lands," which are "owned" by the United States. Thus, the 1982 Act recognizes that the revenues from the leasing of the latter inure to the benefit of the States, because it gives the States certain rights with respect to information concerning, and the collection of revenue from, the leasing of "Federal lands." By contrast, a tribe's rights under the 1982 Act extend only to information regarding revenues derived from the leasing of "Indian lands," which, as noted above, include only those in which Indians have an *ownership* interest. 30 U.S.C. 1732-1736.

There accordingly is nothing in the Mineral Lands Leasing Act that would deprive the State of its right to receive 50% of the revenues of the Federal Government's mineral leasing of the public lands at issue in this case merely because they are located within the boundaries of what the Tenth Circuit found to be the still-existing Uncompahgre Indian Reservation.

2. Petitioners in fact do not suggest that there is any basis in the Mineral Lands Leasing Act for the Tribe's urging of an "Indian reservation" exception that would deprive the State of its share of revenues under that Act and require that all such revenues be paid to the Tribe. Petitioners instead cite the Tribe's previous reli-

ance on 25 U.S.C. 398b, which states that "[t]he proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order [Indian] reservations * * * shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation * * * was created * * * ." See Pet. Supp. Br. 12-13. However, this provision, which was enacted as Section 2 of the Act of March 3, 1927, ch. 299, 44 Stat. 1347, has no relevance here.

a. The 1927 Act—which in any event was superseded by the Indian Mineral Leasing Act of 1938 (25 U.S.C. 396a *et seq.*) as regards leases entered into after that date (see *Montana* v. *Blackfeet Tribe*, No. 83-2161 (June 3, 1985), slip op. 4)—applied only to the leasing of those lands within the boundaries of an Executive order Indian reservation that were actually held for the tribe's benefit. This is evident from Section 1 of the 1927 Act, 25 U.S.C. 398a, which authorizes oil and gas leasing of "[u]nallotted lands" within a reservation created by Executive order "for Indian purposes." The term "unallotted lands" refers to lands still held for "Indian purposes"—*i.e.*, held in trust for the benefit of the tribe. That term does not encompass lands within an Indian reservation, such as those within the original Uncompahgre Reservation at issue in this case, that have been restored to full and unencumbered *public* ownership. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 151 (1982) (referring to lands covered by the 1927 Act as "Indian lands"). The Tribe has no remaining equitable interest in such lands, and it accordingly has no claim to receive any revenue from the leasing of them. Cf. 54 Interior Dec. 559, 560 (1934).

It is significant in this regard that Section 1 of the 1927 Act (44 Stat. 1347) required the consent of the tribe concerned for the leasing of any lands to which that Act applied. See 25 U.S.C. 398a, incorporating 25 U.S.C. 398. Congress surely did not intend to impose a precondition of tribal consent on the leasing of public lands, in

which the tribe had no interest. The 1938 Indian leasing statute, which since 1938 has governed the mineral leasing of all "unallotted lands" on an Indian reservation (see *Montana* v. *Blackfeet Tribe*, *supra*), likewise requires the consent of the tribe for the leasing of all lands to which it applies. 25 U.S.C. 396b. It follows that those Indian leasing statutes—including provisions for the tribe to receive the royalties and other revenues—do not apply to lands that have been restored to public ownership.

The legislative history of the 1938 Act further supports this conclusion. As the Court observed in *Montana* v. *Blackfeet Tribe*, the 1938 Act was intended to apply to " 'tribal lands' " and to ensure that Indians receive " 'the greatest return from their property' " (slip op. 7 n.5, quoting S. Rep. 985, 75th Cong., 1st Sess. 2 (1937), and H.R. Rep. 1872, 75th Cong., 3d Sess. 2 (1938)).[1] The lands within the boundaries of the original Uncompahgre Reservation at issue here are public lands, not "tribal lands" that are the "property" of the Uncompahgre Indians. Those lands therefore are not governed by the 1938 Act or its 1927 predecessor, upon which petitioners rely.

b. The absence of any basis for a claim by the Ute Tribe to the revenues from the leasing of public lands within the boundaries of the original Uncompahgre Reservation is especially clear. ~~And~~ As we have pointed out in our amicus brief (at 2, 18-19), the Uncompahgres were not even to be compensated for the lands that were opened to settlement pursuant to the 1897 Act (30 Stat. 62), because the Uncompahgre Reservation was regarded as only a temporary reservation pending the making of individual allotments. This important fact led us to oppose the Ute Tribe's motion to intervene in *Andrus* v.

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[1] See also *Kerr-McGee Corp.* v. *Navajo Tribe*, 471 U.S. 195, 199 (1985) (the 1938 Act applies to leasing of "tribal lands"); *id.* at 200 (emphasis added) (the tribe "agrees to sell the right to the use of *its lands* for mineral production").

Utah, even if, contrary to our submission therein (as here), the Uncompahgre Reservation was not disestablished by the 1897 Act. The Tribe argued in *Andrus* v. *Utah* that if the Uncompahgre Reservation still existed, the State was barred from making school indemnity selections within the boundaries of that Reservation, by virtue of the provisions in the general indemnity selection statutes and Section 6 of the Utah Enabling Act forbidding the selection of lands "embraced in Indian * * * Reservations." 43 U.S.C. 851-852; 28 Stat. 109. The government responded, however, that these statutory prohibitions do not apply "to reservation acreage which has been unconditionally opened for entry under the general land laws, without any restriction or obligation on the part of the government to pay over or apply the proceeds of sale to the benefit of the Tribe." See Memorandum for the Peititoners in Response to Tribe's Motion to Intervene at 6, *Andrus* v. *Utah*, *supra*. That also is the basis for the submission in our amicus brief in the instant case (at 20-21) that the Indian reservation exception in the Taylor Grazing Act does not apply to *public* lands within the boundaries of an Indian reservation, and that the rights of Taylor Grazing Act permittees in the area therefore are not affected by the Tenth Circuit's holding that the Uncompahgre Reservation continues to exist.[2]

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[2] The 1948 Act by which Congress added the Hill Creek Extension to the Uintah and Ouray Reservation (Act of Mar. 11, 1948, ch. 108, 62 Stat. 72 *et seq.*) confirms that the Tribe has no interest in mineral leasing within the boundaries of the original Uncompahgre Reservation except on lands that were restored to tribal ownership by the 1948 Act. Thus, even with respect to lands within the Hill Creek Extension, the Act provides that "[v]alid rights and claims of individuals initiated under the public-land laws or otherwise involving any lands within said boundary shall not be affected by this Act" (62 Stat. 77)—a provision that preserves any claims, including those for oil shale (see *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980)), under the mining laws—and that rights owned by

3. For the foregoing reasons, we disagree with petitioners' submission that the allocation of "hundreds of millions of dollars" of oil and gas royalties and other revenues may turn on whether the Uncompahgre Reservation was disestablished by the 1897 Act. In any event, this new argument by petitioners applies only to the Uncompahgre Reservation, not the Uintah Reservation.[3] We have suggested in our amicus brief (at 22) that as an alternative to denying the certiorari petition, the Court may wish to vacate the judgment below and remand the case to the court of appeals for further consideration of the status of the Uncompahgre Reservation in light of the views expressed by the United States, which were not previously presented to the court of appeals.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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the United States in fissionable minerals and in certain other lands withdrawn for oil shale purposes are specifically withheld from the transfer to tribal ownership of lands within the Extension (62 Stat. 77). The necessary premise of these provisions must be that, but for the 1948 Act, the United States, not the Tribe, retained complete ownership of *all* mineral rights in the original Uncompahgre Reservation.

[3] There apparently are no unreserved public lands on the Uintah Reservation. Mineral leasing in the National Forest portion of that Reservation clearly is governed by the Mineral Lands Leasing Act of 1920. See 30 U.S.C. 191; U.S. Amicus Br. 17.

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